(d) The statement made by Jane Saxe to Brine a month before the insured died, that insured had not disclosed his stay in Beth Israel Hospital and that it was only caused by a "social lapse", was a sufficient disclosure of whatever would have been shown by the hospital records, and as a matter of law, constituted a sufficient basis for a waiver, notwithstanding the policy provision limiting the authority of agents in this respect;

(e) The claims to the proceeds of the policy were not compulsory counterclaims in the prior proceeding instituted by Petitioner for the cancellation of the policy, because that would compel a waiver of trial by jury.

The dissenting opinion (R. 210) holds that Petitioner's motion for a directed verdict should have been granted because the misstatements in the application were such that all reasonable jurymen must have found that they materially affected the acceptance of the risk, and there was not a sufficient disclosure of facts concerning the Beth Israel Hospital experience, and the medical history shown thereby, to support a waiver as a matter of law.

The two Justices who joined in the majority opinion on February 15, 1943, denied a petition for a rehearing of the case before the entire Court of six Justices (R. 212), apparently without any consideration by the remaining four Justices.

JURISDICTIONAL STATEMENT.

The statutory provision believed to sustain jurisdiction in Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, par. 1, 43 Stat. 938.

The date of the judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed is January 25, 1943.

STATUTE INVOLVED.

The proceedings involve, among other things, the construction of the Act of Congress of June 19, 1934, 48 Stat. 1133, c. 672, par. 15, ch. II (District of Columbia Code (1940) sec. 35-414) as follows:

> "The falsity of a statement in the application for any policy of insurance shall not bar the right to recovery thereunder unless such false statement was made with intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the company."

QUESTIONS PRESENTED.

1. Can an appellate court lawfully take hearsay testimony which the trial court admitted for a limited purpose and upon only one issue, and, in order to sustain the verdict of a jury, use it for another and different purpose which the court says "affects nearly every issue in the case", when the opponent had no opportunity to meet such testimony on such an issue and the jury itself, under the rulings and instructions of the trial court, could not have used the hearsay testimony as a basis for its verdict.

2. Does the statute, *supra,* require proof from an insurer of an intention to deceive, and from an insured only bona fide answers to questions in policy applications concerning sojourns in hospitals and consultation with or attendance by physicians, where it is established that the answers to such questions are contrary to fact and relate to matters materially affecting the acceptance of the risk.

3. Does the statute, *supra,* require proof that the cause of the concealed hospitalization was the cause of death, or existed when death occurred, in order to avoid liability because of the falsity of a statement in an application concerning sojourns in hospitals and consultation with or attendance by physicians.

4. Does the representation to an insurer that the insured had been in a hospital because of a "social lapse" resulting from drink, and was not ill, constitute in law a sufficient basis for a waiver by the insurer of the fact that the record of such hospital actually showed admission for a suspected bleeding duodenal ulcer and a final diagnosis of duodenal ulcer at the time of discharge; and if so, does an agent have the power to bind the insurer by receiving such representation where there is a provision in the policy denying such power to the agent.

5. Does Rule 13(a) of the Federal Rules of Civil Procedure make a claim to the proceeds of a policy a compulsory counterclaim in a prior proceeding brought by the insurer to cancel the same policy.

REASONS FOR ALLOWANCE OF WRIT.

1. The Court of Appeals, in holding that testimony as to a conversation, not binding on Petitioner and admitted solely in connection with an alleged waiver, was legally sufficient evidence to establish the falsity of the Beth Israel Hospital record, has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the power of supervision existing in this Honorable Court.

2. The Court of Appeals holds that the statute requires proof of an intention to deceive, and only bona fide answers to questions concerning hospitalization and consultation with or attendance by physicians even though the representations with respect thereto are shown to be both false and material to the acceptance of the risk, and further that there must be proof that the cause of the hospitalization was the cause of the death or existed when death occurred. This construction of the statute is contrary to its express provisions and to the construction placed upon similar statutes by other Federal courts. It is a question of sub-

stance involving the interpretation of a statute of the United States applicable to the District of Columbia which is of vital importance, not in this case alone, but to every contract of insurance in force in said District.

3. The Court of Appeals has decided important questions of law, relating to waiver based upon an admittedly incomplete disclosure of facts and also the validity of a contract provision limiting the power of an agent to bind the company by receiving any representation or information, and it has decided both questions contrary to applicable decisions of this Court.

4. The Court of Appeals has construed Rule 13(a) of the Federal Rules of Civil Procedure contrary to the intent of the rule and contrary to all other decisions of the Federal courts thereon.

Wherefore, your Petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court to review the judgment entered by the United States Court of Appeals for the District of Columbia in this case on January 25, 1943.

The Prudential Insurance Company of America,

By

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